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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Nexa Mortgage, LLC, an Arizona limited liability company,

CASE NO. 2:23-cv-00410-SPL

**DEFENDANT WILTON PERSON'S
MOTION TO DISMISS**

Plaintiff,

1

Smart Mortgage Centers, Inc., an Illinois for-profit corporation; and Wilton A. Person.

Defendants.

Pursuant to FRCP Rule 12(b)(2), Defendant Wilton A. Person moves to dismiss Plaintiff's Complaint as to him on the basis the court lacks personal jurisdiction over him. This motion is supported by the following Memorandum of Points and Authorities and declaration of Wilton A. Person.

Dated 8th day of March, 2023.

BROENING, OBERG, WOODS & WILSON, P.C.

By/s/ *Donald Wilson, Jr.*

Donald Wilson, Jr.

Brian Holohan

Attorneys for Defendant Person

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 This case arises from a series of lawsuits that Defendant Wilton Person, an Illinois
3 lawyer, commenced on behalf of his Illinois citizen client (Defendant Smart Mortgage) in
4 Illinois against Plaintiff and (in one case) against one of Plaintiff's Illinois employees. Where
5 is there any connection between that series of events and Arizona? Plaintiff alleges
6 (seemingly with a straight face) that it is an Arizona citizen and that Mr. Person and his
7 client knew that commencing Illinois lawsuits against Plaintiff would cause injury to
8 Plaintiff in Arizona. Stated another way, there mere fact Defendants sued Plaintiff, an
9 Arizona citizen, somewhere other than Arizona is sufficient to satisfy the due process
10 requirements of personal jurisdiction.

11 Plainly, it is not. There is no personal jurisdiction over Mr. Person – whose
12 declaration establishes beyond any question that he is an Illinois citizen who has no contact
13 whatever with Arizona – in Arizona. The case against him should be dismissed.

14 **LEGAL ANALYSIS**

15 A district court sitting in diversity has personal jurisdiction over a defendant to the
16 extent provided by the law of the forum state. *Warfield v. Gardner*, 346 F. Supp. 2d 1033,
17 1038 (D. Ariz. 2004). Arizona's long arm rule, Ariz.R.Civ.Pro. Rule 4.2(a), now explicitly
18 extends Arizona courts' ability to exercise jurisdiction over out-of-state defendants to the full
19 extent permitted by the United States Constitution.

20 **General jurisdiction**

21 It is well established that in order for a court to exercise personal jurisdiction over a
22 nonresident defendant, that defendant must have at least "minimum contacts" with the
23 relevant forum such that the exercise of jurisdiction "does not offend traditional notions of
24 fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).
25 Two types of personal jurisdiction have been recognized. The first is general jurisdiction. For
26 general jurisdiction to exist, the defendant must engage in "continuous and systematic

1 general business contacts," *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S.
 2 408, 416 (1984), that "approximate physical presence" in the forum state. *Bancroft &*
 3 *Masters, Inc. v. Augusta Nat'l, Inc.*, 223 F.3d 1082, 1086 (9th Cir.2000). "A state court may
 4 exercise general jurisdiction only when a defendant is 'essentially at home' in the State . . .
 5 Only a select 'set of affiliations with a forum' will expose a defendant to such sweeping
 6 jurisdiction." *Ford Motor Co. v. Montana Eighth Judicial District Court*, 592 U.S. ___, ___,
 7 141 S.Ct. 1017, 1024 (2021).

8 There is, unquestionably, no general jurisdiction over Mr. Person in Arizona. The
 9 Complaint makes no effort to allege otherwise, or to allege facts from which general
 10 jurisdiction could be found.

11 **Specific jurisdiction**

12 The other form of personal jurisdiction is specific jurisdiction. This is the so-called
 13 minimum contacts standard. *Bancroft & Masters, Inc.*, 223 F.3d at 801-2. The Arizona
 14 Supreme Court's most recent specific personal jurisdiction pronouncement is *Planning*
 15 *Group of Scottsdale, L.L.C. v. Lake Mathews Mineral Properties, Ltd.*, 226 Ariz. 262, 246
 16 P.3d 343 (2011).¹ *Planning Group* holds that a court in this state has specific jurisdiction
 17 over an individual "when the aggregate of the defendant's contacts with this state
 18 demonstrate (1) purposeful conduct by the defendant targeting the forum, rather than
 19 accidental or casual contacts or those brought about by the plaintiff's unilateral acts, (2) a
 20 nexus between those contacts and the claim asserted and (3) that exercise of jurisdiction
 21 would be reasonable."

22 The Ninth Circuit has a similar standard:

23
 24 ¹In *Beverage v. Pullman & Comley, LLC*, 234 Ariz. 1, (2014), the Arizona Supreme
 25 Court affirmed the Court of Appeals' decision in a case involving specific jurisdiction. The
 26 Supreme Court held that the Court of Appeals "properly extrapolated" the *Planning Group*
 holding and offered only a minor clarification of the import of certain facts to the specific
 jurisdiction analysis in that case. 234 Ariz. at 3 ¶¶2-3. Nevertheless, the *Beverage* Court did
 not change the *Planning Group* specific jurisdiction analysis.

1 “(1) The non-resident defendant must purposefully direct his activities or
2 consummate some transaction with the forum or resident thereof; or perform
3 some act by which he purposefully avails himself of the privilege of
4 conducting activities in the forum, thereby invoking the benefits and
5 protections of its laws;

6 (2) the claim must be one which arises out of or relates to the defendant's
7 forum-related activities; and

8 (3) the exercise of jurisdiction must comport with fair play and substantial
9 justice, i.e. it must be reasonable.”

10

Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004) (quoting *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987)). Analyzed under either standard, all three elements are missing.

11 **1. Mr. Person engaged in no conduct targeting Arizona**

12 In determining what constitutes purposeful conduct targeting a forum, the United
13 States Supreme Court has held that "it is essential in each case that there be some act by
14 which the defendant purposefully avails itself of the privilege of conducting activities within
15 the forum State, thus invoking the benefits and protections of its laws." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (internal citation omitted). The purposeful availment
16 requirement "ensures that a defendant will not be hauled into a jurisdiction solely as a result
17 of 'random,' 'fortuitous' or 'attenuated' contacts." *Id.*

18 Purposeful availment, one of the two standards under the first prong of the Ninth
19 Circuit formulation, requires viewing the defendant's contact with the forum state to
20 determine whether the defendant "purposefully avail[ed] itself of the privilege of conducting
21 activities within the forum State, thus invoking the benefits and protections of its laws." *Id.*
22 at 802 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). Purposeful direction, by
23 contrast, focuses on the defendant's actions outside the forum state that are directed at the
24 forum. *Id.* at 803. The former is a contract-based analysis; the latter is used in suits sounding
25 in tort. *Id.* at 802.

26 ...

1 The focus for personal jurisdiction purposes is the Defendant's conduct. *Sinatra v.*
 2 *Nat'l Enquirer, Inc.*, 854 F.2d 1191, 1195 (9th Cir. 1988). In order for purposeful availment
 3 to exist, the defendant need have 'performed some type of affirmative conduct which allows
 4 or promotes the transaction of business within the forum state.' *Sher v. Johnson*, 911 F.2d
 5 1357, 1362 (9th Cir. 1990) (quoting *Sinatra*, 854 F.2d at 1195)). To meet the purposeful
 6 direction test, there must be "express aiming," which is satisfied when the defendant's
 7 allegedly wrongful conduct was "expressly aimed" at the forum state in which the harm
 8 occurred. *Dole Food Co. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002) (citing *Calder v.*
 9 *Jones*, 465 U.S. 783, 788-89 (1984).

10 Both *Planning Group* and *Beverage* demonstrate what is required for "targeting"
 11 under the Arizona standard and how such targeting is absent here. In *Planning Group*, the
 12 Planning Group of Scottsdale ("TPG") was made aware of an investment opportunity in
 13 California, provided by Lake Mathews Mineral Properties ("Lake Mathews"). 226 Ariz. at
 14 264, ¶2. Lake Mathews, a California based partnership, solicited an investment from TPG by
 15 mailing a due diligence report from its office in California for delivery to representatives of
 16 TPG in Arizona. *Id.*, ¶3. After TPG received the report, its representatives engaged in
 17 extensive communications via telephone, email, and fax with representatives of Lake
 18 Mathews. *Id.*, ¶4. Eventually, TPG representatives traveled to California to meet with
 19 representatives of Lake Mathews. *Id.*, ¶5. After this meeting, Lake Mathews faxed a
 20 preliminary agreement to TPG in Arizona which provided for immediate funding on the
 21 mining project from TPG in exchange for a promise to repay the loan at a 9% interest rate.
 22 *Id.* at 265, ¶6. TPG signed the agreement and sent initial payments to Lake Mathews
 23 according to the preliminary agreement's terms. *Id.*, ¶7. After failing to reach a more definite
 24 agreement, TPG filed a complaint in Arizona alleging tort and breach of contract claims. *Id.*,
 25 ¶9.

26 ...

1 The Supreme Court reversed the trial court's dismissal,² finding that the "issue, after
 2 all, is whether the aggregate of the defendants' contacts with this state make it fair and
 3 reasonable to haul them into court here with respect to the claims arising out of those
 4 contacts." *Id.* at 268, ¶25. The Court held that "the enterprise that would allow the defendants
 5 to repay the loan was outside the forum state, but the contract itself ha[d] a] sufficient
 6 relationship to the forum state to support specific jurisdiction." *Id.* at 270, ¶33 (emphasis
 7 added). Unlike in *Planning Group*, where the out-of-state party was directing actions at
 8 Arizona, Mr. Person did not enter into any agreement or direct any action towards this State
 9 which would support a finding of jurisdiction.

10 In *Beverage* the Court of Appeals found personal jurisdiction over a Connecticut
 11 law firm which "accepted a telephone call from Beverage's Arizona agent, sent
 12 promotional materials about the law firm to Beverage's agent in Arizona, then
 13 affirmatively agreed to represent Beverage, knowing he lived in Arizona. In connection
 14 with that representation, the [firm] accepted Beverage's request that they analyze the *bona*
 15 *fides* of [a] tax shelter, then drafted and issued an opinion letter to Beverage in Arizona,
 16 knowing that Beverage would rely on the letter in filing his federal income tax return from
 17 Arizona." 232 Ariz. at 417, ¶11.

18 In the two Arizona cases, there was some act by the defendant committed in, or
 19 directed at, Arizona. Under the federal standard, the defendant's conduct must be aimed at
 20 Arizona causing harm there. This element is lacking here. Here Mr. Person did nothing to
 21 target Arizona. Yes, Mr. Person sued an Arizona resident in Illinois,³ but that is not enough.

22
 23 ²*Id.* at 271 ¶42.

24 ³The Complaint alleges that Plaintiff "has been granted 60 financial licenses" but
 25 stops short of explicitly alleging it holds an Illinois Mortgage Banking license. Nevertheless,
 26 the court may take judicial notice of the fact Plaintiff holds a Mortgage Banker's license in
 Illinois. <https://idfspr.illinois.gov/Banks/MBLookup/MBList.htm>. That Plaintiff did business
 in Illinois pursuant to its Illinois license only reinforced the conclusion Illinois was the
 proper forum.

1 The various lawsuits at issue all alleged wrongful conduct occurring in Illinois.⁴ That Mr.
 2 Person supposedly had to have known that the Illinois lawsuits would negatively impact an
 3 Arizona resident in Arizona is not the standard. *LNS Enterprises, LLC v. Continental Motors,*
 4 *Inc.*, 22 F.4th 852 (9th Cir. 2022) (Defendant's alleged knowledge of product malfunctions in
 5 other states insufficient to show that defendant purposefully availed itself of the privilege of
 6 doing business in Arizona.)

7 If the rule was otherwise, any time a nonresident lawyer commences a lawsuit in
 8 another state against an Arizona resident, that nonresident lawyer would be subject to suit in
 9 Arizona on that basis alone. By the same reasoning, every nonresident litigant could be
 10 hauled into Arizona court when the only contact with Arizona was suing an Arizona resident
 11 in another state. How could that be constitutionally permissible?

12 **2. There is no causal nexus**

13 The next requirement – a nexus between Mr. Person's contact with Arizona and the
 14 claims being made by Plaintiff – is not only absent, but also underscores that specific
 15 jurisdiction over Mr. Person in Arizona for acts he performed in Illinois is not
 16 constitutionally proper.

17 [T]he forum State may exercise jurisdiction in only certain cases. The
 18 plaintiff's claims, we have often stated, "must arise out of or relate to the
 19 defendant's contacts" with the forum . . . Or put just a bit differently, "there
 20 must be 'an affiliation between the forum and the underlying controversy,
 principally, [an] activity or an occurrence that takes place in the forum State
 and is therefore subject to the State's regulation.'"

21 *Ford Motor Co.*, 592 U.S. at ___, 141 S.Ct. at 1025 (internal citations omitted). There is no
 22 allegation in the Complaint that Mr. Person committed any act *in* Arizona. The "activity or ...
 23 occurrence that takes place in the forum State" required by Supreme Court precedent is
 24 completely – and conspicuously – absent.

25 ⁴Oddly, one of the lawsuits, the so-called defamation action alleged at ¶¶38 to 43, was
 26 against a Nexa employee not Plaintiff Nexa itself. The claim that Mr. Person knew that
 Plaintiff would somehow be harmed as a result makes no sense.

3. It would be unreasonable to exert personal jurisdiction

The analysis of the reasonableness of exercising personal jurisdiction is only undertaken if minimum contacts are first found. *Planning Group*, 223 Ariz. at 270, ¶ 37. Because Mr. Person lacks minimum contacts with Arizona, the Court need not reach this issue. But Mr. Person's complete lack of contacts with Arizona, coupled with the fact that every allegedly wrongful act committed by Mr. Person occurred in Illinois and the fact that the Nexa employees who were allegedly wrongly targeted reside in Illinois, only underscore the lack of any arguable basis for personal jurisdiction over Mr. Person.

CONCLUSION

There is no personal jurisdiction over Mr. Person in Arizona. The Court should therefore dismiss the case against him.

Dated 8th day of March, 2023.

BROENING, OBERG, WOODS & WILSON, P.C.

By/s/ Donald Wilson, Jr.

Donald Wilson, Jr.

Brian Holohan

Attorneys for Defendant Person

CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I hereby certify that on March 8, 2023, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing, and via Email, to the CM/ECF registrants:

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